Supreme Court, U.S.
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No. 01-594

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

THOMAS C. WALSH
JAMES F. BENNETT
BRYAN CAVE LLP
One Metropolitan Square
St. Louis, Missouri 63102

GEORGE W. BRANDT
LYONS, BRANDT, COOK
& HIRAMATSU
1800 Davis Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

PETER R. PADEN
Counsel of Record
PHILIP E. KARMEL
LAURENCE A. HORVATH
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for Petitioners

175858

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (the "FSIA" or "Act") establishes the ground rules for claims against a foreign state and, also, an "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1330(a), 1603(a). The term "agency or instrumentality of a foreign state" is defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2).

The Court granted the petition for a writ of certiorari to resolve the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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OPINIONS BELOW

The Ninth Circuit's opinion is reported at 251 F.3d 795 (9th Cir. 2001) and is reproduced in the appendix to the petition for a writ of certiorari in No. 01-594 ("Pet. App.") at 1a. The district court's orders holding that it had jurisdiction, denying rehearing of that order, dismissing the action for *forum non conveniens*, and denying rehearing of that order are reproduced at Pet. App. 55a, 49a, 34a and 27a, respectively.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 30, 2001, and entered its order denying timely petitions for rehearing *en banc* on July 10, 2001. Pet. App. 120a. The petitions for a writ of certiorari in No. 01-593 and No. 01-594 were filed on October 9, 2001. In an order dated June 28, 2002, the petitions were granted and the cases consolidated. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act ("FSIA" or "Act") is codified at sections 1330, 1332(a)(4), 1391(f), 1441(d), 1602-11 of title 28, United States Code. It provides, among other things, that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed" to federal court. 28 U.S.C. § 1441(d). Section 1603(a) of title 28, United States Code defines "foreign state" to include any "agency or instrumentality of a foreign state," which is in turn defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state* or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b) (italics added). The questions presented involve the language in italics.

STATEMENT OF THE CASE

1. The Nature of the Case and the Proceedings Below

This case presents claims by citizens and residents of Costa Rica, Ecuador, Guatemala and Panama who contend that, while employed on banana farms in their home countries, they suffered personal injuries from exposure to dibromochloropropane (DBCP), a pesticide formerly used on banana trees.

The plaintiffs ("Respondents") filed their complaint on October 3, 1997, in the Circuit Court of the First Circuit of the State of Hawaii. The defendants are alleged manufacturers of DBCP and operators of the foreign banana farms where Respondents were employed.

Defendant Dole Food Company, Inc. ("Dole"), the lead petitioner in No. 01-593, impleaded Dead Sea Bromine Co., Ltd. ("DSB" or "Petitioner") and its subsidiary, Bromine Compounds Limited ("BCL"), the petitioners in No. 01-594, alleging that DSB and BCL (collectively, the "Dead Sea Companies" or "Petitioners") manufactured and sold DBCP to one or more defendants. Petitioners removed the action to the U.S. District Court for the District of Hawaii.

The removal was based on 28 U.S.C. § 1441(d), which provides that any foreign state may remove claims asserted against it to federal court. The FSIA defines "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), which is, in turn, defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). Petitioners contend that they are agencies or instrumentalities within the meaning of the Act, because during the period of time of the actions giving rise to the claims asserted against them, the State of Israel held a majority ownership interest in both Companies through a tiered ownership structure.

After the Dead Sea Companies removed the action, Dole filed a supplemental notice of removal alleging federal question jurisdiction. Pet. App. 5a, 58a. Respondents moved to remand on the ground that Petitioners are not agencies or

instrumentalities of Israel within the meaning of the Act and that there was no subject matter jurisdiction on the alternative theory set forth in Dole's notice. The defendants moved to dismiss the claims on the ground of *forum non conveniens*.

On September 9, 1998, the district court held that Petitioners do not qualify as agencies or instrumentalities of the State of Israel. *Id.* 71a. The court agreed with Petitioners' position – and that of every appellate court that has addressed the issue – that, although the State of Israel no longer owned a majority interest in the Companies by the time the suit was filed, an entity is within the purview of the FSIA if it was an agency or instrumentality of a foreign state during the period of time of the alleged conduct on which the claims for relief against it are based. *Id.* 62a-64a. Nevertheless, the court held that during this relevant time period, neither DSB nor BCL was an entity a "majority of whose shares or other ownership interest" were owned by the State of Israel. The court acknowledged that the State of Israel had "indirect ownership" of both companies, but, in its view, such ownership was insufficient to establish jurisdiction under the Act. *Id.* 71a.[1] The district court concluded, however, that it had federal question jurisdiction and granted the defendants' motion to dismiss for *forum non conveniens*. *Id.* 115a, 117a-118a.

The court of appeals affirmed the district court's conclusion that the Dead Sea Companies do not qualify as agencies or instrumentalities of Israel, on the ground that Israel was not the direct shareholder of either company. *Id.* 23a-24a. The court of appeals reversed the district court's finding of federal question jurisdiction and, accordingly, ordered that the action be remanded to state court. *Id.* 26a.

The Dead Sea Companies' status under the FSIA has been the subject of litigation in a number of other DBCP cases for the past eight years. In several lawsuits brought in Texas state

1. There is no dispute that DSB and BCL meet the other requirements of § 1603(b): they are entities separate from the State of Israel (§ 1603(b)(1)) and are not citizens of or created under the laws of the United States or any third country (§ 1603(b)(3)).

courts against the same principal defendants as in this case, thousands of individuals alleged that they too had labored on banana farms in Central America and other regions of the globe and had suffered injuries from exposure to DBCP. One or both Dead Sea Companies were impleaded and removed the cases to federal court, where they were consolidated. In response to a motion to remand, Judge Sim Lake of the U.S. District Court for the Southern District of Texas concluded that the Dead Sea Companies are agencies or instrumentalities under the FSIA and thereupon granted the defendants' motion to dismiss for *forum non conveniens*. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318-19, 1340 n.33 (S.D. Tex. 1995); *Rodriguez v. Shell Oil Co.*, 932 F. Supp. 177, 180 n.6 (S.D. Tex. 1996). The U.S. Court of Appeals for the Fifth Circuit expressly affirmed Judge Lake's FSIA rulings in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000) ("*Delgado*"), *cert. denied*, 532 U.S. 972 (2001). The Ninth Circuit, in its ruling below, rejected the holding of *Delgado*. Pet. App. 23a-24a.

Upon petitions for a writ of certiorari filed by the Dead Sea Companies and the defendants, this Court, after requesting the Solicitor General to submit a brief expressing the views of the United States,[2] granted the petitions.

2. Statement of Facts

a. The State of Israel Created DSB to Develop and Market the State-Owned Resources of the Dead Sea.

The Dead Sea is a 400-square-mile lake located between Israel and Jordan. Its rich mineral deposits, which include bromine, potassium, and magnesium, are among Israel's relatively few natural resources. Joint Appendix ("JA") at 70, 75, 80, 125-26. The State of Israel created DSB, a corporation organized under the laws of Israel and headquartered in Beer Sheeva, Israel, in 1955 to develop and market the Dead Sea's bromine resources in a manner consistent with Israel's national interests. JA 70-71.

2. Brief for the United States dated May 2002 ("U.S. Amicus Brief").

DSB has, since the early 1960s, operated under an exclusive subconcession granted by its parent company, Dead Sea Works Ltd. ("Dead Sea Works"), to extract bromine and bromine compounds from the Dead Sea. JA 70-71, 153-76. Dead Sea Works, in turn, holds the exclusive concession, granted by Israel's national legislature (the Knesset), to extract minerals from the Dead Sea. JA 124-50. The concession states that its object is "to regulate the efficient exploitation" of the "minerals of the Dead Sea," which as "natural resources of the State of Israel" should serve "the interests of the economy of the State." JA 125.

DSB's Articles of Association declare that the State possesses "Vital Interests" in the Company, including: (i) the "[s]upervision of the control of . . . natural resources for their efficient development and exploitation, including maximum application in Israel of the results of the investments, research and development"; (ii) the "[p]reservation of the character of the Company as an Israeli company whose center of business and management is in Israel"; and (iii) the "[p]revention of the achievement of a position of influence in the Company by . . . elements which may prejudice the State's foreign and defense interests." JA 107-08; *see also* JA 73-74.

b. During the Time of the Acts at Issue, the State of Israel Owned a Substantial Majority of DSB's Shares Through Its Ownership of DSB's Parent Corporation and Thus Had a Substantial Majority Ownership Interest in DSB.

The State of Israel held a substantial majority ownership interest in DSB during the time period 1968-95.[3] From 1968-75, the State held a 99% ownership interest in DSB. During this period: (i) the State owned 99% of the shares of Dead Sea Works, an Israeli company whose principal offices are in Beer

3. This time period is over inclusive for purposes of the questions presented in this case, in view of Respondents' allegation that they were first exposed to DBCP manufactured or distributed by the Dead Sea Companies after 1975, JA 24, and that DBCP was not used after the mid-1980s. JA 26.

Sheva, Israel and (ii) Dead Sea Works owned virtually all shares of DSB (99.9% of its shares), except for a single share owned directly by the State. JA 71-72, 82, 86.

From 1975-77, the State had a 98% ownership interest in DSB. During this period: (i) the State transferred its shares in Dead Sea Works to Israel Chemicals Ltd. ("ICL"), an Israeli company owned entirely by the State of Israel; (ii) ICL owned approximately 98% of the shares of Dead Sea Works, which continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. JA 72, 82, 84, 86.

From 1978-83, the State had a 91% ownership interest in DSB. During this period: (i) ICL, which continued to be owned entirely by the State, reduced its ownership in Dead Sea Works to approximately 91%; (ii) Dead Sea Works continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. *Id.*

From 1983-86, the State had an 88% ownership interest in DSB. During this period: (i) ICL, which continued to be owned entirely by the State, reduced its ownership in Dead Sea Works to approximately 88%; (ii) Dead Sea Works continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. *Id.*

From 1986-1992, the State continued to hold an 88% ownership interest in DSB. During this period: (i) Dead Sea Works transferred one share of DSB to ICL and one share to each of four ICL subsidiaries to be held in trust for Dead Sea Works and (ii) all other ownership arrangements remained the same. JA 86.

From 1992-95, the State had a 70% (computed as 80.03% x 88%) ownership interest in DSB, including a Special State Share. During this period: (i) the State took the first steps to privatize ICL (up until this time, the State had owned 100% of ICL's shares) by offering 19.97% of ICL stock for public sale; (ii) the State continued to own the remaining 80.03% of ICL's shares; and (iii) ICL continued its ownership of 88% of Dead

Sea Works, which continued to own almost 99.9% of the shares of DSB. JA 72-73, 82, 86.

In connection with ICL's contemplated privatization, the State converted its one ordinary share of DSB into a Special State Share, which entitles the State to separately approve or disapprove: (i) any merger of DSB, (ii) any alteration of its structure; (iii) any acquisition or holding of 14% or more of its share capital; (iv) any acquisition or holding of 25% or more of such share capital; (v) the holding of share capital that confers upon its holder the right or ability to appoint directly or indirectly 50% or more of DSB's directors; and (vi) any action by ICL to sell DSB stock or assets. JA 74, 86-87, 104-09.

From 1995 to the present, the State has continued to hold the Special State Share but no longer holds a majority ownership interest in DSB. During this period: (i) the State sold an additional 24.9% of its ICL stock which, taken together with certain minor transactions in the intervening years, reduced the State's ownership in ICL to 48.5%; (ii) in March 1997, the State sold an additional 17% of ICL stock, which reduced the State's share ownership of ICL to 31.52%; (iii) Dead Sea Works transferred its shares in DSB to ICL, so that today both Dead Sea Works and DSB are direct subsidiaries of ICL; and (iv) the State continued to own the Special State Share in DSB that it was issued in 1992. JA 72-73, 84.

A chart illustrating the State of Israel's ownership of DSB in the period 1970-1985 is in the record (JA 95) and is annexed to this brief as an addendum.[4]

4. Dole also impleaded Petitioner BCL, a wholly or partially owned subsidiary of DSB from 1968 to 1995. During the period of time of the acts complained of, the State of Israel held a majority ownership interest in BCL, although the precise percentages varied somewhat and were slightly less than its percentage stake in DSB. The particular facts concerning BCL's ownership history are set forth in the record. JA 71-72, 86-88, 92-94. The arguments presented here with respect to DSB apply with equal force to BCL. For the sake of simplicity, however, this brief focuses on the State of Israel's ownership of DSB. If DSB is an instrumentality of Israel, the case was properly removed to federal court, and the judgment below must be reversed.

c. Pursuant to Israel's Government Companies Law, the State of Israel Controlled and Managed DSB Until Its Privatization in 1995 in the Same or Like Manner as a Company Directly Owned by the State.

DSB did not hold the status of an ordinary, private business corporation in Israel. Rather, because it was majority owned by the State, it was organized and operated pursuant to the Government Companies Law ("GCL"), an English translation of which is reproduced at JA 175-222. This statute, which was enacted in 1975, establishes the legal mechanism by which the State of Israel controls and supervises entities, such as Petitioners, a majority of whose shares are owned, directly or indirectly, by the State. The GCL's provisions with regard to companies that are directly owned by the State (referred to in the GCL as "Government Companies") apply "in like manner" to subsidiaries of such companies (referred to in the GCL as "Government Subsidiary Companies"), with very limited and specified differences. *See* GCL §§ 57, 1(a) (JA 208-09, 177). As discussed in detail below, until the privatization of ICL in 1995, the State of Israel, by virtue of its indirect ownership of a majority of DSB's shares, controlled the company in the same way and through the same administrative mechanism that it controlled companies a majority of whose shares were directly owned by the State.

The State, as owner of all or almost all of the shares of DSB's ultimate parent company, exercised substantial control and oversight over the Company through the GCL's approval and appointment mechanisms, and these incidences of ownership were not diminished by the fact that the State held its majority ownership interest through a tiered subsidiary structure. In this respect, the GCL vests the State of Israel with far greater direct control over subsidiaries of government-owned companies than is permitted under U.S. corporate law. *Post*, at 28-29.

(i) The State's Control Over Government-Owned Companies Such as DSB Involved the Highest Ranking Officials and Bodies of the Israeli Government.

As with directly owned companies, the Government's control over their subsidiaries, such as DSB, involved the highest ranking officials and bodies of the Israeli government. These officials and bodies included the Minister of Finance and other Ministers of the Government, *see* GCL §§ 1(a), 5, 6(3), 11(b), 15A(b), 18(a), 18B, 22(a)(3), 22(c), 24(a), 26(b), 34(a), 37(a), 44(c), 47(c), 57(1), 57(2) (JA 177-209); the Knesset Finance Committee, *see* GCL §§ 1(a), 5(b), 10, 11(b), 15A(a), 17 (JA 177-87); the Appointments Review Committee, appointed, in part, by the Minister of Finance and Attorney General, *see* GCL § 18B (JA 189); and a Cabinet Committee on privatization that included the Prime Minister, Minister of Finance and Minister of Justice, *see* GCL §§ 1, 59A (JA 177, 211). In addition, the Government Companies Authority (the "Authority"), whose director was an appointee of the Government upon the proposal of the Ministry of Finance, *see* GCL §§ 51-56 (JA 206-08), was charged with advising and assisting government-owned companies and their subsidiaries in the conduct of their business; monitoring their activities, course of business, financial position and wage policies; and communicating its findings to the Government's Ministers. GCL §§ 54, 57 (JA 207-09).

(ii) The Government Controlled DSB's Board of Directors in the Same or Like Manner as a Company Directly Owned By the State of Israel.

The Government controlled the Board of Directors of DSB through appointment of the directors of ICL (DSB's parent company) and approving the appointment of DSB's directors. GCL §§ 18(a), 57(3) (JA 188, 209). The approval of a director was to be made by the Minister of Finance and the Minister of

Industry and Trade,[5] after consultation with an Appointments Review Committee comprised of representatives of the Attorney General, an individual chosen from a select list of persons put forward by the Minister of Finance and Minister of Justice, and a representative of the Authority. GCL §§ 57(3), 18B(a) (JA 209, 189). Had DSB been directly owned by the State of Israel, the only difference would have been that its directors would have been appointed – in addition to being approved – by the Ministers. As it was, the GCL required the DSB directors to be appointed by the directors of DSB's parent companies, who themselves were subject to appointment by or approval of the Ministers. GCL §§ 18(a), 57(3) (JA 188, 209). In all other respects, the Government's control over the Board of a directly owned company (such as ICL) and the Board of its subsidiary (such as DSB) was the same. GCL § 57 (JA 208-09).

The Government, through the Minister of Finance, after consultation with the Authority, was empowered to set the remuneration of directors of both directly owned companies and their subsidiaries. GCL § 19 (JA 190-91). The Government, through the request of the Minister of Finance, the Minister of Industry and Trade, or the Authority, was also empowered to direct that a special meeting of their respective boards of directors be held to deal with any matters specified in the request. GCL § 26(b) (JA 195). Finally, the Authority sent a non-voting director to each board meeting to participate in the meeting as a director. GCL § 27(b) (JA 195).

5. The GCL defines the term "Ministers" – a term used throughout the statute – as "the Minister of Finance, together with the Minister designated by Law as responsible for the affairs of the company." GCL § 1(a) (JA 177). The record establishes that, at least for most of the time period at issue here, the "Minister designated by Law as responsible for the affairs" of DSB was the Minister of Industry and Trade, although during some time periods this Minister is referred to as the Minister of Trade and Industry or the Minister of Industry, Trade and Tourism. *See, e.g.*, Petitioners' Lodging ("L–") at L–17-19, L–22, L–25, L–45, L–47, L–49-50, L–159. For the sake of simplicity, the Brief will refer to this Minister as the Minister of Industry and Trade.

(iii) The Government Appointed and/or Approved the Appointment of the Chairman of the Board and the CEO of DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

DSB's Chairman of the Board of Directors and its Chief Executive Officer[6] (who could not be the same individual) could be appointed only with the approval of the Minister of Finance and the Minister of Industry and Trade. GCL §§ 24(a), 37(a), 24(b) (JA 193, 201). The Ministers' approval could be given only after consultation with the State's Appointments Review Committee. GCL § 18B (JA 189). However, if the Government deemed it necessary to do so, the Government, after consultation with the Appointments Review Committee, was empowered to appoint a director as Chairman or to appoint the CEO. GCL §§ 24(a), 37(a) (JA 193, 201). The Government also had the power to remove the CEO from office. GCL §§ 42(a)(2), 42(a)(5a) (JA 202-03). These powers applied equally to companies directly owned by the State of Israel as they did to indirectly owned companies, such as DSB. GCL §§ 24(a), 37(a), 42(a) (JA 193, 201, 202-03).

(iv) Government Approval was Required for All Changes in DSB's Capital Structure, Business Purposes or the Purchase of Securities in the Same or Like Manner as a Company Directly Owned by the State of Israel.

Both routine and extraordinary changes in the capital structure of DSB required approval of the Government (the Prime Minister and his cabinet). With respect to such approvals, the only difference between a directly owned company and its subsidiary, such as DSB, was that the approvals

6. This brief uses the familiar title Chief Executive Officer or CEO, whereas the GCL uses the title general manager, which has the same meaning under Israeli law. JA 77, 193, 201-04.

for DSB were forwarded to the Government through its parent companies. GCL § 57(2) (JA 209). The Government could decide to approve the changes only if they were proposed to the Government by the Minister of Finance and the Minister of Industry and Trade and submitted to the Government with an opinion of the Authority. GCL §§ 11(b), 57(2) (JA 183, 209).

Such approvals were required for: (i) change in the objects (business purposes) of the company; (ii) increase in registered share capital; (iii) change in the rights attached to the shares; (iv) allotment of shares of the company, or consent to transfer of shares if such allotment or transfer would alter the balance of power among shareholders or confer upon a new shareholder ten percent or more of share capital or voting power or the right to appoint a director; (v) issuance of redeemable shares or convertible debentures; (vi) conversion of the company into a private company; (vii) reorganization or dissolution of the company; (viii) establishment of a subsidiary or purchase of another company's shares; and (ix) an undertaking to effect any act referred to above. GCL § 11(a) (JA 182-83).

(v) The Government Controlled the Budget and Business Plans of DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Government Companies Law required DSB's board of directors, as well as all other Government companies, to draw up and submit an annual draft budget to the Authority, the Minister of Finance, the Minister of Industry and Trade, the State Comptroller, and, upon its request, the Knesset Finance Committee. GCL § 34 (JA 199-200). The GCL also required such companies to submit a report of the company's resources and the manner of their use; a balance sheet; and a profit-and-loss account, including the purposes to which profits were to be applied. GCL § 33(a) (JA 198-99). A decision as to the use of profits by a board of directors of either a directly owned Government company or its subsidiary was subject to approval by the Authority. GCL § 33(c) (JA 199).

(vi) The Government Required DSB to Use Consolidated Financial Reports in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Government Companies Law generally required consolidated financial reporting of all government companies and their subsidiaries. GCL § 33(a)(4) (JA 199). ICL, Dead Sea Works, and DSB, as commonly owned members of the same family of government companies, presented consolidated financial statements to the Government for its review. L–29, L–296, L–316.

(vii) DSB Had to Obtain Government Approval for the Appointment of its Auditors and Attorneys in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Authority was required to approve the accountant selected to serve as the auditor for DSB. GCL § 44(a) (JA 204). The appointment of a legal advisor to DSB also required the Authority's approval. GCL § 47(a) (JA 205). The Minister of Finance and Minister of Justice, with the approval of the Knesset Finance Committee, were empowered to prescribe rules as to the appointment of auditors and legal advisors. GCL §§ 44(c), 47(c) (JA 204-05). The GCL provisions imposed the same requirements on directly owned companies.

(viii) The Government Had Access to Information Concerning DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Authority was empowered to receive any requested information from DSB and inspect its records and documents. GCL § 55 (JA 208). In addition, DSB's Chairman was required to submit to the Minister of Finance, Minister of Industry and Trade, and the Authority, twice yearly and at any time requested, a written report on the Company's activities and the work of its board of directors. GCL § 25 (JA 194).

(ix) DSB Had to Obtain Government Approval for Privatization in the Same or Like Manner as a Company Directly Owned by the State of Israel.

Government approval was also required before the sale of shares of subsidiary companies. GCL § 15A (JA 185). Thus, Government approval was required before ICL, Dead Sea Works, or DSB could sell their holdings of shares in Dead Sea Works, DSB, or BCL. The mechanism for approval involved proposals of the Minister of Finance and the Minister of Industry and Trade, submitted to the Government with the opinion of the Authority. *Id.*

d. The State of Israel Repeatedly Exercised its Far-Reaching Ownership Rights to Control DSB's Affairs.

The Government's extensive ability to supervise and regulate DSB in the same manner as a company directly owned by the State of Israel was by no means merely theoretical. The Government's pervasive control over DSB manifested itself in every facet of the company's operations and activities.

Acting through its highest officials and levels of government, the State of Israel: (i) regularly appointed employees of the Ministries of Finance and Industry and Trade to DSB's Board of Directors (L–1-22, L–344); (ii) issued directives as to the procedures to be followed by DSB's Board of Directors, prohibiting the appointment of alternative or substitute directors, terminating the tenure of directors for excessive absences and specifying the content of the Board's minutes (L–23-42); (iii) approved all DSB's directors (L–43-50); (iv) appointed the Authority's employees to participate in meetings of DSB's Board and its committees, such as the balance sheet committee (L–51-60); (v) monitored the attendance and the activities of members of the company's Board of Directors (L–61-73); (vi) approved the company's managing directors (CEOs) and their compensation (L–74-76); (vii) established procedures for the selection and remuneration of legal advisors, including the requirement that the Authority approve such

selection (L–77-108); (viii) established procedures for the selection and remuneration of auditors, including the requirement that the Authority approve such selection (L–109-17); (ix) restricted the circumstances and amounts of DSB's charitable contributions (L–131-50); (x) on multiple occasions required and/or strongly encouraged DSB to purchase Israeli products even if the cost was higher than the cost of non-Israeli goods (L–159-78); (xi) required DSB to freeze salaries and wages (L–179-81); (xii) approved or set the compensation to be paid to DSB executives, including retirement benefits (L–187-89); (xiii) established policies as to the use of company cars (L–190-97); (xiv) issued directives regarding hiring and promotion policies (L–214-21); (xv) encouraged DSB to become more efficient and to curb its expenses (L–222-34); (xvi) approved DSB's investments (L–235-44); (xvii) approved changes to DSB's capital structure and the issuance, sale and transfer of shares (L–245-78); (xviii) approved employee bonuses (L–279-88); (xix) approved the formation of a subsidiary (L–289-90); (xx) required changes in DSB's corporate charter (L–291-304); (xxi) restricted ICL from changing DSB's objects, transferring their shares, changing their share capital or selling their assets without Government approval (L–305-14); and (xxii) reviewed, approved and made recommendations with respect to DSB's budget, business plan and operations (L–315-29).

In sum, the record provides overwhelming evidence that the State's indirect ownership of the majority of the shares of DSB gave it pervasive oversight and control and other incidences of ownership over the company, and that the State exercised its powers in this regard on a routine basis on matters great and small.

SUMMARY OF THE ARGUMENT

I. DSB is an entity a majority of whose shares were "owned by" the State of Israel within the meaning of 28 U.S.C. § 1603(b)(2). Under the plain and ordinary meaning of the words "owned by," a majority of DSB's shares were "owned by" the

State through the State's ownership of the Company's parent corporations. In the context of tiered corporate subsidiaries, this Court has held that the statutory phrase "owned by" may be reasonably interpreted to include a shareholder's interest in the assets of its subsidiaries. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292, 298-99, 318-19 (1988). Similarly, this Court has used the words "sole shareholder" to describe a parent corporation's relationship to its wholly owned subsidiary's wholly owned subsidiary. *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 339 (1990) ("*Alcan*"). The court of appeals erred in holding that the State of Israel had to be a "direct" owner of DSB's shares. The statute imposes no such requirement. As the usage of the words "owned by" by this Court and many lower courts makes clear, the plain and ordinary meaning of these words encompasses direct as well as indirect ownership through a subsidiary.

Additionally, it is clear that the State of Israel held a "majority . . . ownership interest" in DSB within the meaning of 28 U.S.C. § 1603(b)(2). The plain and ordinary meaning of the term "ownership interest" encompasses the nature of the stake that a shareholder (such as the State of Israel) has in the subsidiaries of the corporation that the shareholder owns directly. This Court has used the term "ownership interest" in precisely this way, *see Alcan*, 493 U.S. at 335, as have numerous lower courts in a wide variety of contexts. This usage is supported by definitions of the term "interest" in legal and ordinary dictionaries, which establish that it is a broad and general term, encompassing a wide variety of ownership stakes, including those other than title to an asset.

Application of "owned by" and "majority ownership interest" in accordance with their plain and ordinary meanings would further the statutory purpose of allowing a uniform and principled resolution of claims of agency or instrumentality status across a wide variety of legal systems around the world. It would undermine Congress' legislative intent for an entity's entitlement to such status to turn on such legal formalities as whether title to its shares was directly vested in the foreign state

or vested in some other entity owned by the foreign state. Rather, Congress intended that an entity's entitlement to agency or instrumentality status should turn on whether the foreign state has a majority ownership stake, broadly defined, in the entity claiming such status.

The facts of the present case illustrate the importance of interpreting the statute in this manner. Under Israel's Government Companies Law, the State of Israel had direct powers of ownership and control over DSB in the same or like manner as entities that the State owned directly.

II. The State's ownership of DSB during the time period of its allegedly tortious conduct is sufficient for it to qualify as an "agency or instrumentality." Such an interpretation is consistent with the language of the statute because the use of the word "is" in 28 U.S.C. § 1603(b)(2) does not identify *when* an entity must be majority owned by the foreign state. *See, e.g., GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993) ("use of the word 'is' [in § 1603(b)(2)] could speak to a variety of situations, including the time of the alleged wrongdoing"). The four circuit courts that have ruled on this issue have all held that state ownership at the time of an entity's alleged wrongdoing is sufficient for it to invoke "agency or instrumentality" status under the FSIA. Such an interpretation of § 1603(b)(2) is supported by the use of present tense verbs in other statutory provisions that clearly refer to the time period of the events giving rise to the lawsuit rather than the date on which a suit is commenced in court. *See, e.g.*, 28 U.S.C. § 1605(a)(2) ("causes a direct effect in the United States", a phrase that has uniformly been interpreted by this Court and lower courts as referring to the effect caused by alleged wrongdoing at the time of such conduct).

An essential purpose of the statute is to promote harmonious foreign relations, a purpose that Congress determined would be served by channeling all claims against foreign states and their agencies or instrumentalities to non-jury trial in federal courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493

(1983); 28 U.S.C. §§ 1330(a), 1441(d). Suits against an entity that was an agency or instrumentality of a foreign state at the time of its alleged wrongdoing implicate the foreign relations concerns that the statute was enacted to address. Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d at 1381. *See also Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). Failure to include such suits within the scope of the FSIA could, for example, subject the acts of an instrumentality of a foreign state to adjudication before a jury in a state court proceeding, a result the Act was specifically designed to foreclose. Accordingly, the statute should be interpreted to apply to claims asserted against entities owned by a foreign state at the time of the entity's alleged wrongdoing.

The application of immunity doctrines in other contexts in which a defendant's status has changed between the date of alleged wrongdoing and a lawsuit supports the interpretation of the statute urged here. For example, this Court has held that a government-owned vessel does not lose its sovereign status merely because it is sold to private owners prior to the litigation. *The Western Maid v. Thompson*, 257 U.S. 419, 432-33 (1922). Nor does a federal official or judge forfeit his or her qualified or absolute immunity from suit with respect to acts taken in an official capacity upon retirement from office or the bench.

ARGUMENT

I. DSB IS AN AGENCY OR INSTRUMENTALITY OF ISRAEL BECAUSE THE STATE OWNED A MAJORITY OF THE OUTSTANDING SHARES THROUGH ITS OWNERSHIP OF DSB'S PARENT CORPORATION AND HAD A MAJORITY OWNERSHIP INTEREST IN THE COMPANY.

The State of Israel possessed an overwhelming majority ownership interest in DSB during the time period in which Respondents allege that they were exposed to DBCP. From 1968 to 1983, the State held an ownership interest in DSB that ranged from 91% to 99%, by virtue of holding one share in DSB directly and virtually all of DSB's remaining shares through its parent company or companies. *Ante*, at 5-7. Through a tiered ownership structure, the State of Israel indirectly owned a substantial majority of DSB's shares. Plainly, DSB was an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2).

A. The State of Israel Owned a Majority of the Shares and Had a Majority Ownership Interest in DSB Under the Plain and Ordinary Meaning of These Words.

"The starting point in statutory interpretation is the 'language [of the statute] itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (alteration in original, quoting *United States v. James*, 478 U.S. 597, 604 (1986)). The statutory language at issue here – "a majority of whose shares or other ownership interest is owned by a foreign state" – requires that the foreign state must own a majority of the "shares" or a majority of some "other ownership interest" in order for a company to be an agency or instrumentality of the state. 28 U.S.C. § 1603(b)(2). DSB meets both tests. Indisputably, the State of Israel indirectly owned a majority of DSB's shares, and, by virtue of owning the parent corporation's shares, had a majority ownership interest in DSB.

1. The Plain Language of the Statute Does Not Require a Foreign State To Directly Own a Majority of a Company's Shares.

The statute provides that an entity is majority owned by a foreign state, and thus is an "agency or instrumentality of a foreign state," if "a majority of [its] shares . . . is owned by a foreign state." 28 U.S.C. § 1603(b)(2). On its face, the statute makes no reference to any requirement that the ownership of shares be direct. Indeed, to require that the foreign state *directly* own a majority of the shares of the entity claiming status as an instrumentality would be to read an additional, substantive requirement into the statutory language. As stated by the U.S. Court of Appeals for the Fifth Circuit, "[t]he plain language of the statute simply requires 'ownership' by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado*, 231 F.3d at 176.

Numerous courts, recognizing the statutory text compels this conclusion, have similarly interpreted the statute. *See, e.g.*, *Musopole v. South African Airways*, 172 F. Supp.2d 443, 447 (S.D.N.Y. 2001) ("where, as here, the Republic of South Africa owns an eighty percent beneficial interest in SAA, the fact that it does so indirectly, through its wholly owned subsidiary Transnet, rather than directly, is immaterial to the analysis"); *Watkiss v. Corporate Jets, Inc.*, 2001 WL 1344578, *2 (N.D. Oh. 2001) ("Eurocopter was indirectly owned by the French government through an intermediary corporation [and, thus, f]or purposes of the FSIA, . . . was owned by the French Government."); *In Re Clearsky Shipping Corp.*, 1999 WL 1021825, *5 (E.D.La. Nov. 8, 1999) ("neither the plain language of the statute nor the legislative history suggests that indirect majority ownership through intermediaries was outside the contemplation of § 1603(b)(2)"); *Talbot v. Saipem A.G.*, 835 F.Supp. 352, 353 n.2 (S.D. Tex. 1993) ("That Saipem's ownership by the Italian government is indirect is immaterial."). Indeed, a significant majority of the cases that have specifically addressed the tiering issue have held that indirectly majority-

owned tiered subsidiary entities are "owned" by the government under § 1603(b)(2). *Compare* Dead Sea Companies' Petition for a Writ of Certiorari at 12-14 (citing cases) *with id.* at 16 (citing contrary authority).

This Court has previously acknowledged that a statutory reference to "owned by" may reasonably be read to include the indirect ownership that a parent corporation – that is, a shareholder – has in the assets of a lower tiered subsidiary. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ("*K Mart*"). The statute at issue in *K Mart* prohibited the importation into the U.S. of "any merchandise of foreign manufacture if such merchandise . . . bears a trademark *owned by* . . . a corporation . . . created or organized within, the United States. . . ." 19 U.S.C. § 1526(a) (emphasis added). The Treasury Department's implementing regulations permitted, in certain circumstances, the importation of a product trademarked in the United States by the U.S. subsidiary of a foreign corporation. The validity of such a regulation turned on whether, in the parent-subsidiary context, the foreign corporate parent could be recognized as the true "owner" of the trademark, rather than the U.S. subsidiary in whose name it was registered in this country, permitting the conclusion that the merchandise did not bear a trademark "owned by" a U.S. corporation.

The Court, in three opinions reflecting a different majority for each of two holdings, agreed on one point: that the statutory phrase "owned by . . . a corporation . . . created or organized within . . . the United States" reasonably could be interpreted to refer either to the U.S. subsidiary that directly owned the U.S. trademark or its parent company that, through its subsidiary, indirectly owned the U.S. trademark. 486 U.S. at 292 (Kennedy, J.); *id.* at 298-99 (Brennan, J.); *id.* at 318-19 (Scalia, J.). All members of the Court agreed that Treasury's view that the foreign corporation should be deemed the "owner" of the trademark, notwithstanding that the mark was registered in the United States by its U.S. subsidiary, was a reasonable interpretation of the statute and did not conflict with its plain language. *Id.* In explaining why this is so, Justice Brennan stated:

> "The term ['owner'] is . . . nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied." Black's Law Dictionary 996 (5th ed. 1979). But whether 'ownership' is the '[c]ollection of rights to use and enjoy property, including [the] right to transmit it to others,' or '[t]he complete dominion, title, or proprietary right in a thing,' or '[t]he entirety of the powers of use and disposal allowed by law,' *id.*, at 997, the parent corporation – not the subsidiary whose every decision it controls – better fits the bill as the true owner of any property that the subsidiary nominally possesses.

Id. at 298-99. *Accord id.* at 292 (Kennedy, J.); *id.* at 318 (Scalia, J.).

This Court's discussion and analysis in *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990) ("*Alcan*"), *affirming* 860 F.2d 688 (7th Cir. 1988), further illustrates common understanding and usage concerning concepts of ownership in the context of multi-tiered corporate relationships. At issue in that case was whether a foreign corporation, Alcan Aluminium Limited ("Alcan Limited"), had standing to raise claims on behalf of its second tier U.S. subsidiary, Alcan Aluminum Corporation ("Alcan Corp.").[7] This Court characterized Alcan Limited as the "sole shareholder" of Alcan Corp. 493 U.S. at 339. Moreover, responding to the argument that the second tier U.S. subsidiary was the only entity with standing under California law to bring a state court challenge to the tax scheme at issue, the Court noted that, as the "sole shareholder," Alcan Limited had "total control" over Alcan Corp. and, thus, could cause Alcan Corp. to bring such a challenge if it wished to do so. To disregard this reality, said the Court, "would be to elevate form over substance." *Id.* at 339.

7. Alcan Limited was the sole shareholder of Alcan Aluminium of Canada, Ltd., which, in turn, owned 100% of the shares of Alcan Corp. *See* 860 F.2d at 690 n.1.

The language employed by the Court in these decisions does not reflect isolated or idiosyncratic usage. In *Flink v. Paladini*, 279 U.S. 59, 63 (1929) ("*Flink*"), Justice Oliver Wendell Holmes, writing for the Court, noted that the word "owner" in the statute there at issue is an "untechnical word," and went on to observe that "'[i]n common speech the stockholders would be called owners'" of a corporation's assets. *See also Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703, 706 (1974) ("*Bangor Punta*") (Bangor Punta, a parent company, controlled and directed its third-tier subsidiary through Bangor Punta's "ownership of about 98.3% of the outstanding stock" of that entity); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (1984) ("*Copperweld*") (noting that "a parent and its subsidiary are subject to common ownership" in holding that a parent corporation cannot conspire with its subsidiary to violate the Sherman Anti-Trust Act); *Fletcher's Cyclopedia of the Law of Private Corporations* § 43, at 733-34 (perm. ed. rev. vol. 1999) ("The holding company may be regarded as the 'owner' of the subsidiary's property. . . .").[8]

The everyday use of the word "own" to include the interest of a corporate parent more than one step removed from a subsidiary entity is well illustrated by language chosen in this very litigation by Respondents' counsel. In their brief to the court of appeals below, Respondents described DSB as being "majority-owned by the State of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees dated October 15, 1999 at 7.

Numerous courts have accepted tiered ownership as meeting the requirements of § 1603(b)(2) with no little or no discussion,

8. Other examples of the common usage of "own" to include indirect ownership of tiered subsidiary entities may be found in the language of government regulations. For example, Securities and Exchange Commission regulations generally require that publicly traded companies "consolidate entities that are *majority owned*" for financial reporting purposed. 17 C.F.R. § 210.3A-02(a) (emphasis added).

as though the conclusion were obvious. *See* Dead Sea Companies' Petition for a Writ of Certiorari at 15-16 (citing cases). For example, in *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 427 (7th Cir. 1993), in reference to two second tier subsidiaries of France, Chief Judge Posner paused to consider whether the court had jurisdiction under the FSIA and concluded that "[t]here is no problem" because § 1603(b)(2) "confers federal jurisdiction over civil suits against foreign states as defined by the [FSIA], and the Act's definition includes companies a majority of whose shares are owned by a foreign state." The relative lack of analysis in many of these decisions confirms that the understanding of the relationship between tiered parent-subsidiary corporate entities reflected in this Court's discussions in *K Mart*, *Alcan*, *Flink*, *Bangor Punta* and *Copperweld* quite naturally applies to the common sense reading of the statute. These decisions recognize that, under the plain and ordinary meaning of its language, the Act's application turns on the substance of the foreign state's ownership and resulting control, not the form of the state's ownership.

The United States has argued that the word "direct" must be read into the statute in order to bring it into conformity with "basic legal understandings" that "'[a] corporation and its stockholders are generally to be treated as separate entities,'" U.S. Amicus Brief at 7 (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932)), and "bedrock principles of corporate law." *Id.* at 8 (quoting *United States v. Bestfoods*, 524 U.S. 51, 62 (1998)). This contention is entirely misplaced. There is no dispute that the State of Israel is a separate entity from a corporation in which it owns a majority of the shares, directly or indirectly, and that neither DSB's immediate corporate parent nor the State are answerable for the company's allegedly tortious acts. Neither fact has any relevance to whether, in common parlance and understanding, a majority of DSB's shares were "owned by" the State of Israel.

The discussion in *Delgado* and many of the other lower court FSIA tiering cases cited above mixes reference to the State's indirect ownership of the subsidiary's shares with a

discussion of the State's "ownership interest." In fact, the two statutory phrases are closely related and reinforce the argument that indirect share ownership is encompassed by both. Congress could have chosen to provide that only an entity "a majority of whose shares are owned by a foreign state" is within the purview of the FSIA's reach. It chose instead immediately thereafter to add the notably broad and general phrase "or other ownership interest." Its presence in the statutory definition lends particular weight to the argument that "share ownership" should be construed to include indirect ownership. Surely, Congress' decision to include any entity that possesses a majority ownership interest in a tiered subsidiary, of whatever kind or nature, strongly supports the interpretation that share ownership should be read in an "untechnical" way, *see Flink v. Paladini*, 279 U.S. at 63, to include indirect ownership.

2. The Words "Majority . . . Ownership Interest," in Their Plain and Ordinary Meaning, Refer to a Broad Range of Ownership Rights and Relationships That Encompass the Nature of the Stake that a Majority Shareholder of a Corporation Has in an Entity Owned by that Corporation.

An alternative and independent ground for deeming DSB to be an "agency or instrumentality" under the Act is that the State of Israel had a "majority . . . ownership interest" in DSB within the meaning of § 1603(b)(2). The FSIA does not specifically define the term "ownership interest." Under settled principles of statutory construction, that term should be construed in accordance with its "ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

An "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* at 729 (5th ed. 1979). "More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, *but less than title*." *Id.*

(emphasis added). *See also Webster's Ninth New Collegiate Dictionary* at 631 (1985) (defining "interest" as "right, title, or legal share in something [or] . . . participation in advantage and responsibility"). While it did not directly hold title to DSB's shares, the State of Israel clearly had an interest in the Company that allowed the State to accrue an advantage from its success and control its management and affairs.

The ordinary meaning of the term "ownership interest" quite plainly encompasses the stake that a shareholder has in its corporation's subsidiary. In *Alcan*, this Court used the term precisely this way when it characterized as an "ownership interest" the nature of the interest that Alcan Limited had in Alcan Corp., its second tier subsidiary. 493 U.S. at 335.

Numerous other courts, ruling in a wide range of contexts, have also used the term "ownership interest" to describe the stake of a corporate entity, or the shareholder of such an entity, in a multi-tiered subsidiary corporation. In a case involving an insolvent bank with several tiered subsidiaries, Maryland's highest court noted that the bank's receiver had the powers of the bank and "of any corporation in which [the bank] . . . has a 100% *ownership interest*, directly or through first, second, or third tier subsidiaries." *Gay v. State of Maryland Deposit Insurance Fund Corp.*, 308 Md. 707, 719, 521 A.2d 1205, 1210 (1987) (emphasis added). New York's highest court has used the term "ownership interest" to encompass both direct ownership of shares in a corporation and the nature of the interest acquired in a corporation by owning shares in another entity that owns shares in the corporation, as in the sentence "he had a direct ownership interest in it through personally held shares and also an indirect ownership interest in it through another company he owned . . . which held . . . shares." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 464, 522 N.E.2d 40, 42 (1988). South Dakota's highest court, describing the purchase by a subsidiary of Edward D. Jones & Co. ("Jones") of one-third of the shares in a small oil exploration company, characterized the transaction as one in which "Jones, through an affiliated subsidiary, purchased a one-third ownership interest

in [the oil company]" and stated that "Jones paid $5 million . . . for its ownership interest in [the oil company]." *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 924 (S. Dak. 1994).[9]

The United States asserts that Congress "typically" uses language to signify its intention that a broad reading should be given to such words as "owns." U.S. Amicus Brief at 9 n.4. As noted above, the inclusion of the phrase "or other ownership interest" serves precisely such a function and makes clear, should clarification be needed, that the foreign state need not directly own the shares of a tiered subsidiary in which it owns a majority ownership interest.

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9. *See also Harris v. United States*, 175 F.3d 1318, 1321 (11th Cir. 1999) (in a tax case, the court stated that a shareholder of a subsidiary's publicly-owned parent company had an "indirect ownership interest" in the subsidiary); *Access Now, Inc. v. AMH CGH, Inc.*, 2001 WL 1005593 *1 (S.D.Fla. May 11, 2001) (in an action brought under the Americans with Disabilities Act, the court described the action as one stating claims "against medical facilities, in which [defendant] Tenet Healthcare Corporation . . . had, directly or though one of its subsidiary corporations, a majority ownership interest"); *Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1327 n.39 (Int'l Trade 1999) (in an antidumping case, court described a situation in which a "Mr. X owned 25 percent of MG . . . [, which] owned a 20 percent share of six subsidiary Petitioners" as one in which "Mr. X's indirect ownership interest" in these subsidiary Petitioners was less than the requisite 20 percent under the applicable legal standard); *Bowers v. Wurzburg*, 202 W.Va. 43, 47, 501 S.E.2d 479, 483 (1998) (two corporations that owned 69.9% of the shares of a retailing corporation through an intervening holding corporation described as having an indirect "ownership interest" in the retailing corporation); *Fertilizantes Fosfatados Mexicanos, S.A. v. Chen*, 1992 WL 204394 *1 (S.D.N.Y. 1992) (in a judgment collection case, the court used the term "controlling ownership interest" to describe the relationship between the principal shareholder of a parent corporation and the parent corporation's subsidiaries); *Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. 1143, 1150 (D.N.J. 1991) (foreign state has a majority "ownership interest" in a subsidiary of a state-owned corporation), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992).

3. Israel's Government Companies Law Established the Legal Framework Pursuant to Which the State of Israel Owned and Controlled DSB and Provides Additional Support for the Conclusion that the Plain and Ordinary Meaning of the Terms "Owned" and "Ownership Interest" Encompass the Nature of the State's Interest in the Company.

Under the plain and ordinary meaning of the statutory language at issue here, it should be sufficient that the State of Israel indirectly "owned" a majority of DSB's shares and thereby had a "majority . . . ownership interest" in the Company. Yet, in applying the statutory language to the State of Israel's ownership of DSB, the legal framework under which the State owned the Company provides additional support for the conclusion that the Company's shares can fairly be said to have been "owned by" the State and that the State had a "majority . . . ownership interest" in the Company. Under this legal framework, which was established by Israel's Government Companies Law, the State had far more of the qualities of an "owner" of the Company than would a similarly situated indirect shareholder under American law. Since *K Mart*, *Alcan*, *Flink*, *Bangor Punta* and all of the other cases discussed above that construed or used the terms "owned" or "ownership interest" as encompassing the nature of the stake that an ultimate shareholder has in a tiered subsidiary reached this conclusion under American corporate law principles, the conclusion is reached even more readily under the legal framework under which the State of Israel held its ownership interest in DSB.

Under the law of Delaware, for example, a shareholder's statutory rights, even with respect to the corporation in which it directly holds shares, are quite limited.[10] Significantly, in this

10. The Delaware General Corporations Law ("Del. GCL") provides that the "business and affairs" of the corporation shall be "managed by or under the direction of the board of directors." Del. GCL § 141(a). Thus, "'[a] fundamental precept of Delaware corporation law is that it is the board of directors, and neither the (Cont'd)

context, a shareholder of a Delaware corporation has no formal right to elect or approve the appointment of directors of subsidiary corporations, attend their annual meetings, vote on changes to their corporate charters, or otherwise interact with them in a direct fashion. In these respects, Delaware corporate law is similar to that of New York and other important commercial centers in the United States.

In marked contrast, under Israel's Government Companies Law, the State of Israel, by virtue of its majority ownership interest in DSB, had numerous direct levers of control over and incidences of ownership with respect to that entity. With immaterial exceptions, the GCL's provisions with regard to companies directly owned by the State applied "in like manner" to subsidiaries of such companies. *Ante*, at 8-14. The State, acting through its senior ministers and the Government Companies Authority, controlled the board of directors of DSB, *ante*, at 9-10, appointed or approved the appointment of its Chairman of the Board and CEO, *ante*, at 11, had approval authority over all changes to its capital structure, business purposes or purchase of securities, *ante*, at 12, controlled its budget and business plans, including the purpose to which profits were applied, *ante*, at 12, approved the appointment of its auditors and attorneys, *ante*, at 13, and had plenary access to information

(Cont'd)
shareholders nor managers, that has ultimate responsibility for the management of the enterprise.'" Ward, *Folk on the Delaware General Corporations Law* at GCL-IV-14 (4th ed. 2002-2 Supp.) (citation omitted). One of the few rights a shareholder has is to attend, in person or by proxy, the annual meeting of stockholders to elect directors. Del. GCL § 211(b). Even at the annual meeting, however, stockholders have no right to ask questions, *see Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997), nor do they have a right to call a special meeting. Del. GCL § 211(d). Apart from voting for the board of directors at the annual meeting, a shareholders' other rights are, in essence, limited to seeking to enforce the directors' fiduciary duties and voting on amendments to the corporate charter, a merger, sale of substantially all of the corporation's assets, or dissolution. *Id.* §§ 242(b)(1), 275(B), 271(A).

concerning its affairs, *ante*, at 13. The record indicates, moreover, that these rights were by no means theoretical but were, in fact, routinely exercised in a myriad of ways and contexts. *See ante*, at 14-15.[11] Thus, by virtue of owning DSB's parent corporation, the State of Israel had far more day-to-day input and control over DSB than a majority shareholder in the United States would have over a corporation in which the shareholder held a *direct* majority stake.

In view of the State of Israel's creation of DSB, its overwhelming majority ownership of the Company and its pervasive control and oversight through the mechanism of the Government Companies Law, the State of Israel, in Justice Brennan's words, "fits the bill as the true owner" of DSB. *K Mart*, 486 U.S. at 299. Like the ultimate parent entity in *Alcan*, the State was the "shareholder" of DSB, 493 U.S. at 339, with an indisputable majority "ownership interest" in the company. *Id.* at 335. To disregard these realities in interpreting the language of § 1603(b)(2) "would be to elevate form over substance." *Id.* at 339. Since the State had all of the incidents of "ownership" (and then some) that a shareholder has in a corporation in which it owns a majority of shares, it clearly "owned a majority of the shares" and, as well, owned a "majority . . . ownership interest" under any common sense definition of those terms.

B. The Interpretation of "Owned By" and "Majority . . . Ownership Interest" Urged Here Is Consistent With the FSIA's Legislative History and Would Further the Statutory Objectives.

The interpretation of "owned by" and "majority . . . ownership interest" urged here is fully consistent with the

11. The United States erroneously assumes that the same basic principles of United States corporate law, which in any event in no way preclude the interpretation urged by DSB, would apply to the relationship between the State of Israel and DSB under Israeli law. U.S. Amicus Brief at 8 & 12 n.5. Thus, the suggestion in the U.S. Amicus Brief that a "different approach" might be appropriate under legal regimes dissimilar to that of the United States, *id.* at 12 n.5, is in fact quite applicable.

legislative history of the statute and would further its objectives. An important goal of the FSIA was to define broadly the universe of entities intended to come within its scope. Congress was concerned that suits against such entities, and particularly those suits arising out of commercial activities where the defense of sovereign immunity would not be available, implicate the foreign relations of the United States insofar as they may compel a court to pass judgment on the acts of a foreign sovereign or its agencies or instrumentalities. *Post*, at 32. Congress was also cognizant of the fact that foreign sovereigns were increasingly establishing separately constituted state-owned and controlled enterprises to perform a variety of commercial functions. Congress intended that the definition of "agency or instrumentality" cover a broad spectrum of these state-owned entities. *Post*, at 33. Congress also intended to move away from the rigid application of the "separate entity" rule and an era of judicial decisions that had favored form over substance, by eliminating the significance of separate incorporation in the context of foreign sovereign immunity. *Post*, at 36. A cramped interpretation of "owned" in § 1603(b)(2), reading into the statute the limiting modifier "directly owned," and of "ownership interest" would work against all these Congressional objectives.

1. The Objective of the FSIA was to Create a Broad-Based Scheme Encompassing All Entities in Which Foreign States Possessed a Majority Ownership Interest.

Congress enacted the FSIA to establish uniform "standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("*Verlinden*"). The entities to be accorded foreign sovereign status under the Act are broadly defined to include the foreign sovereign and its political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(b).

The Act provides that all such foreign sovereign entities shall be immune from the jurisdiction of courts in the United

States, subject to various exceptions. 28 U.S.C. § 1604. In fact, the exceptions describe a fairly wide range of cases in which foreign states and their agencies and instrumentalities may be sued, as, for example, where the claims arise out of commercial activities conducted or having a direct effect in the United States. *Id.* § 1605(a)(2). Where an exception applies, such suits may be maintained, but the Act accords certain protections to the foreign sovereign entities. Among other things, they are entitled, pursuant to 28 U.S.C. §§ 1330(a), 1441(d), to federal court jurisdiction, by way of a grant of original jurisdiction[12] and a broad right of removal,[13] and to a non-jury trial.[14]

The provision of a federal forum for such suits is designed to protect the "foreign relations of the United States," *Verlinden*, 461 U.S. at 493; to reduce the potential for conflicting results, *id.* at 497; and to "avoid any local bias . . . inherent in state court proceedings." *In re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990). Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993). All of these concerns are implicated in a judicial interpretation of the reach of the Act's definition of "agency or instrumentality" of a foreign state.

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12. "Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

13. "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum . . ." *Id.* at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631.

14. "Actions tried by a court without [a] jury will tend to promote a uniformity of decision where foreign governments are involved." *Id.* at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611-12.

Congress thus intended the FSIA to create a comprehensive set of ground rules for suits against foreign states and all entities in which such states have a substantial interest, which Congress chose to define, in part, as a majority ownership interest. It did so, because it perceived that suits against such entities, especially in those commercial cases where sovereign immunity was not to be available, and where the actions of state-owned entities would thus be subject to judicial process, adjudication and enforcement, have obvious potential to implicate significant foreign relations interests, requiring the protections afforded by a federal forum and non-jury trial. It is this background and context against which the provisions of the FSIA must be interpreted. *See generally Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (when seeking to ascertain the intent of statutory language, particular attention should be paid to the specific context in which the language is used as well as the broader context of the statute as a whole).

2. A Narrow Interpretation of "Owned By" and "Ownership Interest" Is Inconsistent With the Purposes of the Act.

The House Report on the FSIA, H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., *reprinted in* 5 U.S.C.C.A.N. 6604 (1976), makes plain that Congress intended to cast the agency or instrumentality net broadly. *See, e.g., Verlinden*, 461 U.S. at 488; *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 877-78 (2d Cir. 1981) (Friendly, J.). The Act was crafted to cover a myriad of governmental, social, and economic systems. *See* H.R. Rep. No. 94-1487 at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614. The Report notes the widely varying types of enterprises that Congress had in mind (including trading enterprises, shipping lines, airlines, steel companies, and mining enterprises) and reflects Congress' understanding that these entities would be engaged in commercial activities for profit. H.R. Rep. No. 94-1487 at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6614-15; *see also* S. Rep. No. 94-1310 at 15-16 ("entities which meet the definition of 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state

trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association").

The circumstances of DSB's ownership, in which the foreign state chose to hold its ownership interest through a tiered corporate structure, are far from unique. As this Court observed in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), "[i]ncreasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks." 462 U.S. at 624 (citing Friedmann, *Government Enterprise: A Comparative Study* at 333-34 (W. Friedmann & J.F. Garner eds. 1970) ("Friedmann")); *see also* Friedmann at 307 ("The variety of forms in which the various States have, at different times, proceeded to establish public enterprises is almost infinite. . . ."); *id.* at 333-34 (noting use of tiered subsidiary structures). Were this Court to hold that a foreign state does not have an ownership interest in a company owned through an intervening holding corporation, it would significantly restrict the scope of the statute and make its application turn on a formalistic distinction as to how a government chooses to structure its ownership interest in a state-owned company that has nothing to do with the nature or extent of the government's real life interest in or control over the entity.

There is no reason to assume that the strength of a foreign state's interests or the scope of its involvement dissipate when it employs a tiered ownership structure. *See* Report of the Working Group of the American Bar Association, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l Law 489, 523 (2002). For example, Mexico, the sole owner of that nation's petroleum resources, formerly carried out all production, manufacturing, transportation and distribution through the state petroleum company Petroleus Mexicanos ("Pemex"). *See Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653-54 (9th Cir. 1996). In 1992, Mexico restructured its ownership by establishing Pemex as a holding company with four operating subsidiaries.

Id. Surely, Mexico's interests in its state-owned petroleum enterprise were not materially different before and after that reorganization. Similarly, Honduras holds interests in its lumber industry through a tiered ownership structure, *see Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 382 (5th Cir. 1999), and Venezuela holds its interest in its national oil industry through a tiered ownership structure. *See Lopez Del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 35-6 (D.P.R. 1994).

There is no reason to conclude that these foreign states have any less interest in their critical state-owned resources as a result of their decision to structure the corporate form in which they are held and managed. Nor is there reason to conclude that a suit filed against a tiered subsidiary has the potential to implicate interests that are materially different from those potentially implicated by suits against directly owned corporate entities. In this case, the State of Israel created DSB in 1955 to develop and market primary natural resources of that nation in a manner consistent with the national interests. The Congressional policy concerns underlying the FSIA are in no way diminished by the fact that Israel chose to own and control the company through a tiered corporate ownership structure.

The Ninth Circuit did not articulate any rationale as to why a company that is 100% owned by a foreign state should be entitled to remove a case to federal court but a wholly owned subsidiary of that company should not. Such a result would contravene the clear and significant Congressional objective that entities in which a state holds a majority ownership interest should be within the purview of the Act. Similarly, it would be illogical to read a direct ownership requirement into the statute with the result that a company 51% owned by a foreign state would be entitled to the Act's protections, but a second tier subsidiary in which the state had 100% ownership, albeit indirectly, would not. Under the clear language of statute, the sole focus should be on whether the State's ownership interest, however structured, is greater than 50%. As one court

has observed, the "FSIA specifically provides that 'corporate form' – in and of itself – be immaterial." *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381, 1385 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115, 116-17 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984). Because there is "no policy reason why tiering through an intermediary majority owned by a foreign state should not be permitted under the FSIA," *Linton v. Airbus Industrie*, 934 S.W.2d 754, 762 (Tex. Civ. App. 1996), there is no reason to depart from the plain language of the statute, which requires only that a foreign state have a majority "ownership interest" for the FSIA to apply. The foreign sovereign's internal, administrative decision as to how its ownership interest is held or structured under its form of government and its legal and economic systems is immaterial to the purposes and objectives of the statute and should not control the statute's application to an entity that is majority owned by the foreign state.

3. A Narrow Interpretation Would Represent a Return to the Separate Entity Rule That Congress Rejected in Enacting the FSIA.

There is an additional reason why the Ninth Circuit's interpretation of the statute is not consistent with its origin and purpose. Prior to the FSIA, the "separate entity" rule often prevented foreign corporations from asserting sovereign immunity. Premised on the assumption that states do not perform sovereign acts through corporations, this doctrine provided that corporations owned by a sovereign state were presumed to be separate entities and thus not entitled to assert sovereign immunity. *See, e.g., Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939) ("the [federal] government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work"); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("An instrumentality of Government he might be and for the greatest ends, but the agent, because he is [but an] agent" may not assert sovereign immunity); *Bank of United States v. Planters' Bank*

of Georgia, 22 U.S. 904, 907 (1824) (bank incorporated by and partly owned by the State of Georgia held not entitled to assert sovereign immunity); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L. J. 1148, 1152-53 (1954); Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614, 619 (1950).

As governments increased their use of corporate entities during the last century to perform a variety of tasks to further their interests, the "restrictive" theory of sovereign immunity emerged. Under that approach, immunity from suit is limited to claims based on the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. *Verlinden*, 461 U.S. at 487. Under the "restrictive" theory, courts began to look at various factors to determine whether a corporation, owned or controlled by a government, engaged in either sovereign or commercial acts. While this test appears straightforward, courts applied it in an inconsistent manner. *Id.* at 487-88.

The FSIA was enacted, in large part, to codify the restrictive theory of immunity. *See id.* at 488; H.R. Rep. No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. And by including an "agency or instrumentality" of a foreign state as an entity subject to the FSIA's procedural protections (*e.g.*, federal court jurisdiction) and, in appropriate cases, immunity from suit, Congress unequivocally rejected the separate entity rule and sought to end the confusion surrounding the conflicting applications of that doctrine to claims of foreign sovereign immunity. *See* 28 U.S.C. § 1603(b)(1) (requiring that an "agency or instrumentality of a foreign state" be "a separate legal person, corporate or otherwise" from the foreign state).

In enacting the FSIA, Congress chose to provide procedural protections both to foreign states and their legally distinct agencies or instrumentalities and to regulate claims of sovereign immunity of both, and the ground rules for permitting suits in those cases where immunity from suit is not available, under the same uniform standards. It is thus clear from the structure of the statute that it sought to eliminate the fact of separate

incorporation from the immunity analysis and, instead, focus the court's inquiry on the substance of the State's involvement (*e.g.*, does it own a majority of the shares or other ownership interest of the entity) and the character of the action at issue in the case (*e.g.*, is it a "commercial" act that "cause[d] a direct effect in the United States," *id.* § 1605(a)(2)).

By rejecting the separate entity rule, the Act can be fairly said to have repudiated its underlying doctrinal premise, *i.e.*, that the mere fact of separate incorporation should have dispositive significance in the application of the doctrine of foreign sovereign immunity. The Ninth Circuit's interpretation of the statute – which attaches dispositive significance to the fact that DSB is incorporated as a "separate entity" from its parent corporation – thus represents a step backwards toward the formalistic approach rejected by Congress. Instead of focusing judicial attention on the substantive role of the State and the nature of the conduct undertaken by an entity majority owned by a foreign state, as the statute requires, the Ninth Circuit's approach exhumes the separate entity concept and ignores the Congressional effort to replace that discredited doctrinal framework with new statutory standards.

C. The Ninth Circuit's Rationale for Interpreting the Terms "Owned" and "Majority ... Ownership Interest" so as to Exclude the Interest That a Foreign State Has in State-Owned Companies Held Through a Tiered Subsidiary Structure Does Not Make Sense.

The court of appeals based its decision in this case principally on its conclusion that it was bound by its prior decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.) ("*Gates*"), *cert. denied sub nom.* 516 U.S. 869 (1995), *see* Pet. App. 22a-24a, a case that presented a distinctly different and, indeed, unusual factual backdrop. In *Gates*, the "original" owning entity – the Alberta Pork Producers Development Corporation ("Alberta Pork") – was neither a sovereign state nor a political subdivision, nor was it owned, directly or indirectly by a state or political subdivision. It was, however,

held to be an "organ" of a political subdivision (the Province of Alberta). *See* 28 U.S.C. § 1603(b)(2) (referencing an entity which is "an organ of a foreign state or political subdivision"). Alberta Pork's subsidiary was unable to assert its status as an "agency or instrumentality" based solely on the language of § 1603(b)(2) (referencing majority ownership) because its parent corporation was not owned, directly or indirectly, by a foreign state or political subdivision. Rather, it contended that since its parent, Alberta Pork, was an "organ" of a state, the parent was therefore an "agency or instrumentality of a foreign state" by virtue of § 1603(b). And therefore, went the argument, Alberta Pork was itself a "foreign state" by virtue of § 1603(a), which provides that a "foreign state" includes an "agency or instrumentality of a foreign state" as defined in § 1603(b). On this basis, Alberta Pork's subsidiary argued that it was itself owned by a "foreign state" (Alberta Pork). It is this far more complex statutory analysis, based upon the arguably recursive inter-relationship between §§ 1603(a) and 1603(b)(2), that *Gates* rejected, on the ground that it could unduly expand the reach of the Act to entities far removed from state ownership. *Gates*, 54 F.3d at 1462.[15]

The court in *Gates* never focused on the language of § 1603(b)(2) alone. The facts there did not present a case in which a foreign sovereign entity had any ownership interest, direct or indirect, since Alberta did not directly or indirectly own either Alberta Pork or its subsidiary. However, in the ruling below, the Ninth Circuit interpreted *Gates* more broadly, to require direct share ownership by the foreign state – a result not required by the facts of *Gates*.

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15. Although this recursive inter-relationship between §§ 1603(b)(a) and 1603(b)(2) has been adopted by several courts, *see, e.g., In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), Petitioners here base their argument on the plain meaning of "owned" and "ownership interest." Accordingly, the Ninth Circuit's critique of the recursive interpretation in *Gates* has no bearing on Petitioners' argument.

Although it placed primary reliance on *Gates*, the Ninth Circuit did briefly address DSB's contention that the State of Israel held a "majority . . . ownership interest" in the Company. The court rejected that argument, because, in the court's view, it would "make the majority-shareholder requirement superfluous." Pet. App. 23a. Yet the canon "'a legislature is presumed to have used no superfluous words,'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Platt v. Union Pacific R.R.*, 99 U.S. 48, 58 (1879)), is merely an aid to interpretation and cannot be used to alter the plain meaning of statutory language. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992); *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). For the reasons already explained above, the court of appeals' constricted interpretation of "ownership interest" is contrary to the plain and ordinary meaning of these words, as well as the Congressional intent behind the statute, and must therefore be rejected.

There are two additional reasons why the "no superfluous words" canon does not apply here. First, the presence of the word "other" in "other ownership interest" specifically conveys the notion that "shares" are one type of "ownership interest." Thus, the conclusion that an "ownership interest" includes share ownership is implicit in the very grammar of the sentence. In seeking to interpret "ownership interest" narrowly to exclude share ownership so as to give the reference to "shares" independent meaning, the court of appeals twisted the meaning of the statutory language past the breaking point.[16] Second, if, contrary to the argument presented here, the phrase "a majority of whose shares . . . are owned by a foreign state" is limited to

16. The word "other" is used routinely in the way it is used in § 1603(b)(2). For example, Fed. R. Civ. P. 4(h) provides for "service upon a domestic or foreign corporation or upon a partnership or other unincorporated association." The word "other" in this Rule indicates that an "unincorporated association" includes, but is not limited to, a "partnership." Similar uses of the word "other" are legion. *See, e.g.*, Supreme Court Rule 9(1); Fed. R. Civ. P. 4(j)(2), 8(c), 9(b); Fed. R. Cr. P. 4(d)(1).

direct share ownership, the most logical interpretation of "other ownership interest" would be that it encompasses indirect ownership, eliminating any redundancy in the phrase.

II. THE RELEVANT TIME PERIOD FOR DETERMINING WHETHER AN ENTITY IS AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE INCLUDES THE TIME OF THE ACTIONS GIVING RISE TO THE CLAIM.

Respondents argued in the district court that, since the FSIA defines "agency or instrumentality of a foreign state" as "any entity . . . a majority of whose shares or other ownership interest *is* owned by a foreign state," 28 U.S.C. § 1603(b)(2) (emphasis added), the relevant time period for determining a party's foreign sovereign status is the date of the filing of the lawsuit. Therefore, claimed Respondents, even if DSB were an agency or instrumentality of the State of Israel at the time of the acts giving rise to the DBCP-related claims asserted against it, DSB lost that status with regard to such claims when Israel became a minority shareholder in 1995, two years before the action was commenced. In rejecting that argument, the district court followed the ruling of every appellate court that has faced this issue and held that it is sufficient if the foreign state had majority ownership at the time of the events giving rise to the suit. Pet. App. 62a-64a. The court of appeals did not reach the issue, but expressed skepticism as to the district court's conclusion. *Id.* 20a-22a. The district court's interpretation of the Act is consistent with its statutory language, the statutory purpose, other laws on immunities, and well established caselaw.

A. A Holding that an Entity Is an Agency or Instrumentality of a Foreign State Based on its Status at the Time of the Alleged Wrongdoing is Consistent With the Statutory Language.

The use of the present tense "is" in the phrase "a majority of whose shares or other ownership interest is owned by a foreign state," 28 U.S.C. § 1603(b)(2), does not establish which point in time an entity's shares or other ownership interest must be owned by the foreign state. *GE Capital Corp. v. Grossman*,

991 F.2d at 1381 ("[t]he use of the word 'is' [in § 1603(b)(2)] could speak to a variety of situations, including the time of the alleged wrongdoing."). For the reasons explained below, it should be sufficient under the Act if an entity met the statutory requirements at the time of its alleged wrongdoing.

The present tense is commonly employed to refer to both the past and future as well as the present time frame. Such an interpretation of the statute here is thus entirely consistent with everyday usage of language and commonly understood principles of grammar:

> [T]he present tense of a verb may sometimes refer to the past and to the future as well as to the present. R. Pence and D. Emery, *A Grammar of Present-Day English* 262-63 (2d ed.). For example, the historical present tense is used in narratives to express past events in the present tense. Furthermore, the present tense may be used when the time is actually indefinite. *Id.*

In re Stratford of Texas, Inc., 635 F.2d 365, 369 (5th Cir. 1981). Courts have frequently recognized such use of the present tense by Congress in its legislative enactments. *See Coalition for Clean Air v. Southern California Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) (congressional legislation commonly uses verbs in the present tense to refer to the past, present, or future "all at the same time"), *cert. denied*, 507 U.S. 950 (1993); *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir.) ("it is abundantly clear that Congress intended the present tense language [of the banking statute under review] to apply to past acts"), *cert. denied*, 502 U.S. 809 (1991).

One need look no further than other language in the FSIA to demonstrate that Congress' use of the present tense in that statute cannot be interpreted to refer exclusively to the period that a lawsuit is filed or pending. Section 1605(a)(2) grants a district court subject matter jurisdiction over an agency or instrumentality of a foreign state if the plaintiff's claim is based upon a "commercial activity . . . that *causes* a direct effect in

the United States." 28 U.S.C. § 1605(a)(2) (emphasis added). Although this phrase is in the present tense, like the definitional language in § 1603(b)(2), this Court and others have focused on whether the commercial act caused a direct effect at the time of the act giving rise to the suit, not whether it causes such an effect on the date the suit is commenced. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 611, 618-19 (1992); *Verlinden*, 461 U.S. at 498 n.23; *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127, 129 (2d Cir. 1998); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997); *Aldy v. Valmet*, 74 F.3d 72, 75-76 (5th Cir.), *cert. denied*, 519 U.S. 817 (1996).[17]

B. Applying the FSIA to a Suit Stating Allegations Against an Entity that was an Agency or Instrumentality of a Foreign State at the Time of its Alleged Conduct Serves the Statutory Purpose of Protecting Foreign Relations, Channeling Allegations of this Character to Federal Courts, and Providing Immunity in Non-Commercial Cases.

A primary reason Congress chose to provide a broad right of access to federal courts for foreign states, including their

17. Analogous usage is found in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Under CERCLA a company may be held liable if it "accepted any hazardous substances for transport to disposal . . . facilities . . . from which there *is* a release, or a threatened release which *causes* the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9607(a)(4) (emphasis added). Although the phrase "from which there is a release" is in the present tense, courts look at releases that have occurred at the CERCLA site in the past, well prior to initiation of CERCLA litigation. *See, e.g., Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 655-56, 658-59 (6th Cir. 2000); *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 784-85 (7th Cir. 2000); *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 103-04 (3d Cir. 1999). Similarly, the term "causes" does not require that the release be causing response costs to be incurred on the date a CERCLA lawsuit is filed to recover past response costs. *See* 42 U.S.C. § 9613(g)(2) (limitations period expires 3 years after completion of removal action).

agencies or instrumentalities, was its recognition that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493; *see also* H.R. No. 94-1487 at 32, *reprinted in* U.S.C.C.A.N. at 6631 (citing "the political sensitivity of actions against foreign states" as the rationale for allowing them to remove actions to federal court).

To restrict the application of the FSIA to those cases where the entity whose status is at issue has the requisite relationship with the foreign state at the time suit is commenced would be at odds with the statute's essential purpose of promoting harmonious international relations. Lawsuits based on actions taken while an entity was an agency or instrumentality of a foreign state raise the same types of foreign policy concerns that the FSIA and sovereign immunity in general seek to address. Any lawsuit against a former agency or instrumentality of a foreign state will inevitably be premised on the facts and circumstances that existed at the time the alleged wrongdoing occurred. The fact that the entity is not a foreign state at the time suit is brought does not diminish the foreign policy implications of such a lawsuit or the corresponding comity considerations, as the court will necessarily be called upon to pass judgment on the foreign state's actions at the time the cause of action arose. *See GE Capital Corp. v. Grossman*, 991 F.2d at 1381 (suits against entities formerly owned by a foreign state will likely require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a legal wrong); *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998) (the FSIA was designed to promote harmonious international relations and effectuate notions of comity among nations; such concerns do not vanish when a corporate entity is divested of government ownership before an action is commenced), *cert. denied*, 525 U.S. 1141 (1999); *Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (the interests sought to be promoted by the statute are implicated even after privatization has begun).

Even the court of appeals below, which expressed some solicitude to Respondents' argument on the timing issue, acknowledged that "[w]here the defendant was a foreign state at the time of the alleged wrong, the complaint perforce alleges that the foreign state did something wrong. By adjudicating that claim, the court may have to pass judgment on the acts or decisions of a foreign sovereign." Pet. App. 21a.[18]

Through passage of the FSIA, Congress sought to promote and preserve harmonious international relations by implementing "'comprehensive rules governing sovereign immunity' [of which] the jurisdictional provisions of the Act are simply one part." *Verlinden*, 461 U.S. at 496 (citation omitted). In particular, the FSIA "represent[s] a comprehensive effort 'to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.'" *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1531 (11th Cir.) (quoting H.R. Rep. No. 94-1487 at 6), *cert. denied*, 474 U.S. 995 (1985). The Act accords certain procedural protections to such entities even in commercial cases in which they cannot assert immunity from suit, including a right to federal court jurisdiction and a non-jury trial. 28 U.S.C. §§ 1330(a), 1441(d). Denying foreign state status to an entity that is privatized prior to the filing of a lawsuit but after the alleged acts at issue occurred could result in the actions of a foreign sovereign, taken at the time the cause of action arose, being assessed by a jury in state court. This result would

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18. The Court has cited the same foreign relations concerns as one rationale for the analogous act of state doctrine. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) ("[J]uridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.").

undermine the FSIA's goal of "render[ing] uniform in procedure and substance the treatment of foreign sovereigns subjected to suit in American courts." *Nolan v. Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). Accordingly, the statutory purpose of the FSIA requires that federal courts assume jurisdiction under the statute in cases where the actions of an agency or instrumentality are at issue, even if that party is no longer an agency or instrumentality of a foreign state.

C. Considering an Entity's Sovereign Status Under the FSIA at the Time of Its Alleged Wrongdoing Is Consistent with the Rule Applicable to Other Immunities.

The application of the FSIA to entities that were agencies or instrumentalities at the time of their allegedly tortious conduct is also consistent generally with how other immunity doctrines deal with a change in a defendant's status between the time of the allegedly tortious or unlawful acts and the date of the lawsuit. In the context of domestic sovereign immunity, for example, the status at the time of the alleged wrongdoing is generally dispositive.

This Court has previously held that a defendant retains immunity even if government ownership of the defendant is transferred to a private party between the time of the alleged acts and a suit to recover upon such acts. *The Western Maid v. Thompson*, 257 U.S. 419 (1922). This case addressed *in rem* proceedings against vessels for collisions that occurred while the vessels were owned by or under charter to the United States government. In each instance, the United States government had transferred ownership of the vessel to private hands after the alleged wrongdoing but prior to suit. The Court, in an opinion by Justice Oliver Wendell Holmes, held that the sovereign immunity that attached while the vessels were government owned was not lost when the vessels were transferred to private ownership. *Id.* at 432-33.

The same principles may be found in other immunity contexts. A governmental employee who enjoys qualified

immunity for his official acts does not forefeit his immunity merely because he happens to leave his position with the government before a plaintiff initiates a lawsuit. *See, e.g. Mitchell v. Forsythe*, 472 U.S. 511 (1985). Similarly, a federal judge who enjoys absolute immunity from suit based on judicial acts is not suddenly stripped of such immunity upon leaving the bench.

That such immunities are not lost when the status of the protected entity changes before an action is commenced is equally applicable in the context of the FSIA. As in these examples, an agency or instrumentality of a foreign state is cloaked with certain protections attributable to its sovereign status at the time of the alleged actions giving rise to a lawsuit. Where such an entity is alleged to have committed some wrongful act while it had such status, it is free to invoke these protections. Because such protections are rooted in the doctrine of sovereign immunity, there is no basis to deny their applicability to an entity that was an agency or instrumentality of a foreign state when the act occurred but not at the time of suit.

D. Every Appellate Court to Address the Timing Issue Has Held that the FSIA's Definition of a Foreign State Includes an Entity that was an Agency or Instrumentality of a Foreign State at the Time of the Acts Upon Which the Suit is Based.

The district court held that DSB is entitled to FSIA foreign state status if it was an agency or instrumentality of the State of Israel at the time the alleged wrongdoing occurred. Pet. App. 62a-64a. Similarly, in *Delgado*, Judge Lake held that "[s]ince Israel owned a majority of the shares of Dead Sea when plaintiffs were allegedly exposed to DBCP manufactured by Dead Sea, FSIA jurisdiction exists notwithstanding subsequent changes in ownership." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1340 n.33 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). The holding of these courts is consistent with well established case law.

Four circuits have expressly held that the status of the defendant as an agency or instrumentality of a foreign state at the time of the alleged wrongdoing is sufficient to create FSIA jurisdiction. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d at 480-81; *GE Capital Corp. v. Grossman*, 991 F.2d at 1381; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988); *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347-48 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *accord Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d at 1016 (noting that sensitive foreign relations interests could well remain in any given case even after a company has been privatized).[19]

A number of district courts have also followed *Gould, Grossman* and their progeny. *See, e.g., Daly v. Llanes*, 30 F. Supp.2d 407, 418-19 (S.D.N.Y 1998); *Belgrade v. Sidex International Furniture Corp.*, 2 F.Supp.2d 407, 412-14 (S.D.N.Y. 1998); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530 (S.D. Tex. 1994); *Papanos v. Lufthansa German Airlines*, No. 94-2667-CIV, slip op. at 7 (S.D.Fla. 1995); *but see Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992).[20]

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19. Two of these decisions even indicated that the importance of the FSIA is diminished in the context of protecting entities that were not government-owned at the time of the underlying events. *See Gould*, 853 F.2d at 450 ("[a]s to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts"); *Chase & Sanborn*, 835 F.2d at 1347-48 (implying that the only relevant time for assessing the status of an entity claiming to be an agency or instrumentality is the time of the underlying violation).

20. A few courts have held that an entity's status as an agency or instrumentality of a foreign state at the time a lawsuit is filed also qualifies it to assert the protections of the statute. *See Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994); *Rutkowski v. Occidental Chemical Corp.*, 1998 WL 107342, *2 (N.D. Ill. 1988). These cases do not address whether

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CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

THOMAS C. WALSH
JAMES F. BENNETT
BRYAN CAVE LLP
One Metropolitan Square
St. Louis, Missouri 63102

GEORGE W. BRANDT
LYONS, BRANDT, COOK
& HIRAMATSU
1800 Davis Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

PETER R. PADEN
Counsel of Record
PHILIP E. KARMEL
LAURENCE A. HORVATH
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for Petitioners

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foreign state status at the time the cause of action arose would be sufficient or insufficient under the FSIA. Thus, they do not conflict with the many decisions that have held that agency or instrumentality status at the time of the alleged acts giving rise to liability is sufficient. Rather, these cases support DSB's position that the FSIA applies if a party is a foreign state *either* at the time of the alleged acts giving rise to suit *or* at the time of suit. *See Belgrade*, 2 F.Supp.2d at 413 ("The particular concerns that underlie FSIA jurisdiction are safeguarded under both approaches.").

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ADDENDUM

DEAD SEA BROMINE COMPANY, LTD.
OWNERSHIP CHART